# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-669

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,

*Petitioners,*

v.

SUN OIL COMPANY,
a New Jersey corporation,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN ~~SUPREME COURT~~ COURT OF APPEALS

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**Federal:**



**State:**





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## PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

William Meshriy and Mursell Meshriy, his wife, the petitioners herein, pray that a writ of certiorari issue to the Michigan Supreme Court (the highest court of Michigan in which a decision can be had) to review an order denying the petitioners leave to appeal (and in effect finally affirming) a judgment of the Michigan Court of Appeals rejecting the petitioners' Fourteenth Amendment due process claim (denial of a fair trial in a fair tribunal) asserted in a Michigan trial court of first instance sitting in equity.

## OPINIONS AND ORDERS BELOW

The order of the Michigan Supreme Court denying the petitioners leave to appeal is printed in Appendix A, infra, pages 1a-2a.

The opinion of the Michigan Court of Appeals, whose judgment finalized and affirmed in effect by the Michigan Supreme Court is herein sought to be reviewed, is printed in Appendix B, infra, pages 2a-6a, and is reported at 67 Mich. App. 709 (1976).

The order of the Michigan Court of Appeals denying the petitioners' application for rehearing is printed in Appendix C, infra, pages 6a-7a.

The opinion and judgment of the trial court of first instance are printed in Appendix D and in Appendix E, infra, pages 8a-11a, and pages 11a-12a, respectively.

The pertinent pre- and post-judgment orders of the trial court of first instance are printed in Appendix F and in Appendix G, infra, pages 12a-13a and pages 13a-14a, respectively.

## JURISDICTION

The petitioners' timely application for leave to appeal was denied by the Michigan Supreme Court on August 18, 1976 (Appendix A, pages 1a-2a). The judgment of the Michigan Court of Appeals was entered March 9, 1976 (Appendix B, pages 2a-6a). The petitioners' timely application for rehearing was denied by the Michigan Court of Appeals on April 30, 1976 (Appendix C, pages 6a-7a). The jurisdiction of this Supreme Court to issue the requested writ of certiorari is conferred by 28 U.S.C. § 1257(3).



## QUESTIONS PRESENTED

### I.

Whether the requirement of a fair trial in a fair tribunal, as guaranteed by the Due Process Clause of the Fourteenth Amendment, applies to state action in a state civil proceeding sounding in equity as it does to state action in a state criminal or quasi-criminal proceeding.

### II.

Whether a state trial judge deprived petitioners of a fair trial in a fair tribunal, as guaranteed by the Due Process Clause of the Fourteenth Amendment, when he first entered an order granting petitioners a new trial upon a federal due process claim and motion therefor prior to any opinion or judgment on the merits of a civil proceeding sounding in equity, and then (a) by state investigatory action received and entertained, without notice to petitioners, a witness's letter of complaint and accusation so disparaging against the trial judge for granting a new trial as to make the judge an interested party, (b) entered an order adjourning a new trial after expressing ambiguous concern about said letter to counsel in chambers without disclosing either the accusatory and disparaging contents thereof or the existence of an accompanying investigatory letter by the Michigan Deputy Supreme Court Administrator, and (c) without notice, trial, motion or hearing subsequent to said order granting a new trial, the accused judge sua sponte filed an opinion permitting judgment to be entered against the petitioners as requested by said witness in his said complaining and accusatory letter first sent to the Chief Justice of the Michigan Supreme Court.

## CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the first section of the Fourteenth Amendment to the Constitution of the United States which provides as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

## STATEMENT OF THE CASE

April 17, 1968, petitioners commenced their civil action in the Macomb County Circuit Court, a Michigan trial court of first instance, by the filing of a complaint requesting rescission of a certain lease and option to purchase between petitioners and respondent.

September 21, 1970, petitioners filed an amended complaint (pursuant to consent) in two counts sounding in equity alleging alternative claims for reformation or rescission of said lease and option.

March 17, 1971, trial commenced by taking of testimonial proofs (cross-examination of Walter C. Mason as an agent of the respondent) and was adjourned without date because of sudden illness of respondent's attorney.

September 28, 1971, trial was resumed with the continued cross-examination of said Walter C. Mason.

October 15, 1971, trial proofs were concluded in an equity case involving numerous and complex fact-legal issues, some 1,000 transcript pages of testimonial evidence and some 40 admitted evidentiary exhibits.

January 28, 1972, trial proofs were opened for taking of testimony of a polygraph examiner at instance of trial judge.



January 29, 1973, petitioners filed their motion for a new trial asserting the federal claim that it was then impossible for the trial judge (the Honorable Frank E. Jeannette) to render a disinterested and impartial judgment as guaranteed by the fair trial in a fair tribunal requirement of the Due Process Clause of the Fourteeneth Amendment.

April 16, 1973, the trial judge heard and granted the petitioners' said motion for a new trial, stated on the record his strong inclination to disqualify himself as trial judge, and stated the due process reasons for granting said motion.

May 14, 1973, an order granting petitioners a new trial was entered. (Appendix F, pages 12a-13a).

August 30, 1973 (a new trial having been noticed for September 26, 1973), said Walter C. Mason, without notice to petitioners, forwarded his letter (Appendix H, pages 14a-16a) to the late Honorable Thomas M. Kavanagh, then Chief Justice of the Michigan Supreme Court.

September 4, 1973, without notice to petitioners, the Michigan Deputy Supreme Court Administrator forwarded the Mason letter (Appendix H, pages 14a-16a) and an accompanying investigatory letter (Appendix I, pages 16a-17a) to the Macomb County Court Administrator.

At some undisclosed time prior to September 26, 1973 (the noticed day for commencement of a new trial), said Macomb County Court Administrator, without notice to petitioners, delivered the Mason letter (Appendix H, pages 14a-16a) and the said investigatory letter (Appendix I, pages 16a-17a) to the trial judge.

September 26, 1973, the trial judge met with counsel in chambers and the following transpired (as described in paragraph 12 of the unchallenged affidavit of Robert J. Lord, petitioners' trial attorney, in support of petitioners' subsequent December 10, 1973 motion for a new trial):

> "On September 26, 1973, the Honorable Frank E. Jeannette met with counsel of the parties in chambers with the Macomb County Court Administrator present for reasons unknown to plaintiffs' counsel until the Honorable Frank E. Jeannette, without disclosing a copy thereof, stated that he was disturbed concerning a letter of complaint by said Walter C. Mason and

that he was considering sua sponte setting aside the May 14, 1973 order granting plaintiffs a new trial, the Honorable Frank E. Jeannette otherwise saying in regard thereto that he had been "sold a bill of goods", the said meeting with the Honorable Frank E. Jeannette otherwise being confused, abruptly terminated when the Honorable Frank E. Jeannette left his chambers in a matter of only a few minutes, and otherwise inconsequential except for the disturbed appearance of the Honorable Frank E. Jeannette and a statement by the defendant's attorney that said Walter C. Mason was "out of control" or some such phrase; and the Honorable Frank E. Jeannette did not advise plaintiffs' counsel that he was considering sua sponte setting the May 14, 1973 order for new trial aside for the reason that he had the benefit of months and seemingly years of the trial of this action or that he must arrive at a decision, as such matters are referred to by the Honorable Frank E. Jeannette in his November 1, 1973 opinion."

September 26, 1973 (following the aforesaid meeting in chambers), the trial judge entered an order adjourning trial to the next trial call for the reason that a criminal jury trial was in progress (Appendix J, infra, pages 17a-19a); and a copy of said order was promptly mailed to petitioners' counsel.

September 28, 1973, without notice to petitioners, the Macomb County Court Administrator forwarded his response (Appendix K, infra, pages 19a-20a) to the September 4, 1973 investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix I, pages 16a-17a).

November 2, 1973, without notice, trial, motion or hearing subsequent to said order granting a new trial (Appendix F, pages 12a-13a), the trial judge filed his November 1, 1973 opinion granting judgment to the respondent (Appendix D, pages 8a-11a).

November 19, 1973, the trial judge entered his judgment in the respondent's favor (Appendix E, pages 11a-12a); and subsequently petitioners obtained from the trial judge a copy of the Mason letter (Appendix H, pages 14a-16a),



and obtained from the Macomb County Court Administrator a copy of his letter of response (Appendix K, pages 19a-20a), to the Michigan Deputy Supreme Court Administrator.

December 10, 1973, petitioners filed their second motion for a new trial asserting by reference not only their first federal claim resulting in the May 14, 1973 order for a new trial (Appendix F, pages 12a-13a), but also asserting anew a federal claim that the trial judge had deprived the petitioners of their right to a fair trial in a fair tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment, copies of the August 30, 1973 Mason letter (Appendix H, pages 14a-16a), and the September 28, 1973 letter of the Macomb County Court Administrator (Appendix K, pages 19a-20a), being attached to said motion; and subsequently petitioners obtained from the Macomb County Court Administrator a copy of the September 4, 1973 investigatory letter (Appendix I, pages 16a-17a), of the Michigan Deputy Supreme Court Administrator.

January 20, 1975, the trial judge heard petitioners' motion, the petitioners' orally asserting by counsel: "... (A)s was the case in the plaintiffs' first motion for new trial which was granted by your Honor by an order entered May 14, 1973, the present motion is grounded particularly on a federal claim, that is that the plaintiffs were denied a fair trial before a fair, disinterested and impartial tribunal as guaranteed by the due process clause of the 14th Amendment. This is the question we will take on appeal. . . ." and reading into the record the September 4, 1973 investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix L, pages 20a-21a).

April 21, 1975, the trial judge entered an order denying the petitioners' motion for a new trial (Appendix G, pages 13a-14a).

May 12, 1975, petitioners filed their claim of appeal from said order denying petitioners' motion for a new trial and from said November 19, 1973 judgment.

May 27, 1975, the trial judge entered an order, upon petitioners' motion therefor without opposition from respondent, permitting petitioners to transmit less than a full transcript on petitioners' appeal limited to the following three federal questions:

"Is a state trial court proceeding subject to the reach and force of the Due Process Clause of the 14th Amendment to the United States Constitution?

"The trial judge did not answer this question.

"Plaintiff-appellants contend the answer should be "Yes".

"Did the plaintiffs-appellants present and save a substantial federal claim and question for review?

"The trial judge did not answer this question.

"The plaintiffs-appellants contend the answer should be "Yes".

"Did the trial judge deprive plaintiffs-appellants of a fair trial in a fair tribunal, as guaranteed by the 14th Amendment, when he first entered an order granting them a new trial upon a due process motion therefor prior to any opinion or judgment on the merits, and then (a) received and entertained without notice a witness' letter of complaint and accusation so disparaging against the judge for granting a new trial as to make him an interested party, (b) then entered an order adjourning trial until the next trial call after expressing ambiguous concern about said letter to counsel in chambers without disclosing contents thereof, and (c) then without notice, trial, motion or any hearing on the merits subsequent to the said order granting a new trial, the accused judge 'sua sponte' filed an opinion permitting judgment to be entered against plaintiffs-appellants as pleaded by said witness in his said complaining and accusatory extrajudicial letter?

"The trial judge answered this question "No".

"The plaintiffs-appellants contend the answer should be "Yes"."

March 9, 1976, the Michigan Court of Appeals filed its opinion and decision (Appendix B, pages 2a-6a), affirming



the trial court's denial of petitioners' motion for a new trial asserting their Fourteenth Amendment due process claim.

April 30, 1976, the Michigan Court of Appeals entered its order (Appendix C, pages 6a-7a), denying petitioners' timely application for rehearing (Appendix M, pages 22a-24a).

August 18, 1976, the Michigan Supreme Court entered its order (Appendix A, pages 1a-2a), denying petitioners' timely application for leave to appeal pursuant to the Michigan General Court Rule 853, the first subsection of which (Rule 853.1) provides in material part:

"Appeal may be taken to the Supreme Court only upon application and leave granted, in the discretion of the Supreme Court, from any decision of the Court of Appeals, interlocutory or final, upon a showing of a meritorious basis for appeal and any one of the following grounds.

(1) The subject matter of the appeal involves legal principles of major significance to the jurisprudence of the States.

(2) The decision of the Court of Appeals is clearly erroneous and will cause material injustice.

(3) The decision is in conflict with decisions of the Supreme Court or other Court of Appeals decisions.

• • •"

the petitioners in their said application asserting a meritorious basis for appeal and grounds therefor pursuant to said Rule 853.1(1) (2) (3) (Appendix N, pages 25a-26a).

## REASONS FOR GRANTING WRIT

### 1.

### The Transcendent Importance Of Petitioners' First Question

It was in 1955 when Mr. Justice Black, speaking for a majority of this Supreme Court in *In re Murchison,* 349 U.S. 133, 136, said that a fair trial *in a fair tribunal* was a requirement of the Due Process Clause of the Fourteenth Amendment.

Coincidentally only some six years previously, Jerome Frank, the late distinguished judge of the Second Circuit Court of Appeals, published his *Courts On Trial, Myth And Reality In American Justice,* saying in his concluding paragraphs (Atheneum, N.Y., 1967, at 428-429):

> "... (W)hile concerned with the macrocosm, we dare not overlook the microcosms, the more minute factors that loom large in the lives of individual men. Courthouse ways are important among those factors. And they will be, as long as any sort of civilization endures. For that reason, I have thought it not undesirable to give the lay reader some notion of how our courts actually operate.
>
> "My attitude is precisely the opposite of that recently ascribed to judges by an English lawyer: 'A judge,' he says, 'is called upon to decide all kinds of hotly contested controversies; and this would be the most invidious of tasks if he could not 'cover up' behind a doctrine proclaiming to the world that in fact he has little or no personal discretion, and that he is compelled by ineluctable logic to the conclusions which he reaches.' This lawyer concedes that 'there is much room in the judicial process for the idiosyncracies of the particular judge to assert themselves.' But he maintains that 'the inherent uncertainty ... should be concealed from the laymen,' for the resultant delusion 'will stop the public ... from perceiving ... defects in the legal system which they may be ill-qualified to judge.' To my mind, such judicial concealment is pernicious and undemocratic to the last degree. John Q. Citizen should be told of the flaws in the workings of the courts, and should be taught how to become well-qualified to consider them — differentiating between inherent, ineradicable, difficulties in the administration of justice and those which are eradicable and should be eliminated. For, in a democracy, the courts belong not to the judges and the lawyers, but to the citizens."



The great federal due process mandate of *Murchison, supra,* evolved from *Tumey* v. *Ohio,* 273 U.S. 510, 532 (1927), ("Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."), from *In re Oliver,* 333 U.S. 257, 278 (1948), ("It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal."), and from *Offutt* v. *United States,* 348 U.S. 11, 14 (1954), ("... (J)ustice must satisfy the appearance of justice.").

More recently in *Ward* v. *City of Monroeville,* 409 U.S. 57, 61, 62 (1972), ("Nor in any event may the State trial court procedure be deemed constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance.") this Court further evolved and reinforced the *Tumey-Murchison* Fourteenth Amendment 'fair trial in a fair tribunal' requirement.

In *Ward,* however, as in *Tumey, Oliver, Offutt* and *Murchison, supra,* the reach and force of the 'fair trial in a fair tribunal' due process requirement was applied in a context of a criminal or quasi-criminal proceeding in which the adversaries were the State, as accuser, and an individual, as the accused.

Now, throughout this country, every state criminal or quasi-criminal judicial proceeding is governed by federal standards of a fair public trial in a fair tribunal.

Not yet, however, has this Supreme Court decided to extend or not to extend its greatly evolved federal due process 'fair tribunal' standards to state tribunals adjudicating equity controversies between private parties.

The case at bar presents the important question, transcending the interests of petitioners and respondent, whether the great evolution in this Supreme Court of the 'fair public trial in a fair tribunal' due process requirement reaches for application by federal standards to civil proceedings between private adversaries before a state trial judge sitting in equity.

The answer by this Supreme Court to the first question presented by petitioners would extend to the countless state equity tribunals throughout this country.

No less than in *Tumey, Oliver, Offutt, Murchison* and *Ward, supra,* what is at stake is the federal due process purity of state judicial process and its institutions. Cf. *Kinnear-Weed Corporation* v. *Humble Oil & Refining Company,* 403 F.2d 437, 439, 440 (5 Cir. 1968), where the Fifth Circuit Court said:

> "... (A)s we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. * * *"

2.

**The Blanket Sterilization Of Petitioners' Federal Due Process Claim**

It is not too much to say, we submit, that the deeply rooted 'fair trial' sensibilities of common men in this country are honored in the criminal import of the common law felony known as obstruction of justice; and as said by the Michigan Supreme Court in *People* v. *Coleman,* 350 Mich. 268, 274 (1957), the evil of the crime lies in attempt as well as its success.



Nor, we believe, is there reason to doubt that informed common men would easily perceive their deeply rooted 'fair tribunal' sensibilities as vindicated in *State* v. *Johnson,* 83 N.E. 702 (1908), wherein the Ohio Supreme Court reversed dismissal of Johnson's indictment for endeavoring to influence court officers by his following letter (signed by Johnson as E. T. Ryan) to three circuit judges presiding in a pending civil case between Johnson and one Mark Slater:

> "Columbus, O., 9-28, 1906.
>
> "Judges Wilson, Dustin, and Sullivan, Circuit Court, Columbus, O. — Dear Sirs: I note by the papers that Slated v. Johnson case is up to you. I am a Republican, as you gentlemen are, and I hope I am a good citizen, and I would not even suggest to you that you should in any manner violate your oaths of office or in any manner stultify yourselves in this or any cause of action that comes before you. But I would suggest that it is your duty to search very diligently to find a lawful reason to prevent such a man as Mark Slater going back into the office he has abused and disgraced, from which there is not the least doubt in the world he has stolen thousands of dollars. The man has no moral perception, and seems to believe that he had a perfect right to graft all he might on the side. The Republican Party, as you are well aware, has load enough to carry for the present without loading up again with a Slater. Yours Resp'y, E. T. Ryan."

In pertinent part, the statute under which Johnson was indicted provided:

> "Whoever, corruptly * * * endeavors to influence * * * any juror, witness or officer of any court of this state in the discharge of his duty * * * shall be fined not more than one thousand dollars or imprisoned not more than twenty days, or both."

and the Ohio Supreme Court said (at 703):

> "* * * In enacting this section of the statute the Legislature must have been prompted by a desire to promote decency and propriety in all things pertaining to the administration of justice, for they used, to qualify the endeavoring, the most comprehensive of adverbs."

As concise as the *Johnson* decision is, nothing of the actual indictable circumstances of Johnson's 'dear judge' letter is sterilized by the Ohio Supreme Court.

By comparison, the context actualities of the petitioners' federal due process claim are so sterilized by two Michigan appellate courts that no man reading either the decision of the Michigan Court of Appeals (Appendix B, pages 2a-6a) or the order denying leave to appeal of the Michigan Supreme Court (Appendix A, pages 1a-2a) could possibly assess the actual fact and appearance impact of Mason's 'dear judge' letter (Appendix H, pages 14a-16a) or of the state action by which it and the investigatory letter of the Michigan Deputy Supreme Court Administrator (Appendix I, pages 16a-17a) were delivered to and acted upon by the trial judge, altogether without notice to the petitioners.

An asserted denial of federal due process is to be tested by the totality of facts of a given case. *Betts* v. *Brady*, 316 U.S. 455, 462 (1941). The fundamental requirements of fairness, which are of the essence of due process in a judicial proceeding, are not exhausted in the taking or consideration of evidence but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps. *Morgan* v. *United States*, 304 U.S. 1, 19, 20 (1937).

Omitted entirely from consideration by the Michigan Court of Appeals and the Michigan Supreme Court is the chain of state action by which the Mason letter (Appendix H, pages 14a-16a) and the accompanying Michigan Deputy Supreme Court Administrator's letter (Appendix I, pages 16a-17a) secretly reached the trial judge while the petitioners, unaware and ambushed, were awaiting a new trial based upon the trial judge's order (Appendix F, pages 12a-13a) granting their federal due process claim and motion therefor.



As a matter of appearance and circumstantial impact, if not the directly provable fact, the trial judge sat in judgment of Mason's disparaging complaint against him.

Yet Mason's letter as it was (Appendix H, pages 14a-16a) is only casually referred to by the Michigan Court of Appeals (Appendix B, pages 2a-6a) as "critical of the court".

The only rationale of the Michigan Court of Appeals in rejecting the petitioners' federal due process issue (acknowledged in footnote 2 of the decision, Appendix B, pages 4a-5a) is the mechanical application of a wholly unrelated local standard concerning a wholly unrelated local motion practice. Without reference to any federal due process standard of fact or appearance, the Michigan Court of Appeals in its decision (Appendix B, pages 2a-6a) cites for authority two other Michigan Court of Appeals cases (*Irish* v. *Irish*, 59 Mich. App. 635 (1975) and *Wayne County Prosecutor* v. *Doerfler*, 14 Mich. App. 428 (1968)) applying an 'actual proof of claimed bias or prejudice' standard in the cases of motions made for disqualification of a judge pursuant to Michigan General Court Rule 405.1(3) and (8) which provides:

> "Grounds for Disqualification. The issue of disqualification of a judge to hear an action may be raised by motion of any party or by the judge upon his motion. Where a judge is disqualified from hearing an action, another judge of the same circuit shall hear the same. If no other judge is available within such circuit, the court administrator shall assign a judge from another circuit to hear such action. The judge shall be deemed disqualified to hear the action when the judge:
>
> * * *
>
> "(3) is personally biased or prejudiced for or against any party or attorney;
>
> * * *
>
> "(8) for any other reason is excluded or disqualified from sitting as a judge at the trial."

This Supreme Court has often recognized that the requirement of due process cannot be ascertained through

mechanical application of a formula. *Groppi* v. *Leslie*, 404 U.S. 496, 500 (1972).

"Due process" emphasizes fairness between the State and the individual. *Ross* v. *Moffitt*, 417 U.S. 600, 609 (1974).

By state action the Mason letter produced a trial by ambush undercutting even so much as an informed opportunity for the petitioners to make a local motion for disqualification of the trial judge.

When an asserted federal right is denied by a State court, the sufficiency of the grounds of state denial is for this Supreme Court to decide. *Titus* v. *Wallack*, 306 U.S. 282, 291 (1938).

The assertion of a federal right, when plainly and reasonably made, is not to be defeated under the name of local practice. *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). A State court cannot sterilize a federal claim by putting on the adjudication a local label. *Angel* v. *Bullington*, 330 U.S. 183, 190 (1946).

This Supreme Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. *Cox* v. *Louisiana*, 379 U.S. 559, 562 (1965).

## CONCLUSION

For the reasons set forth above, the petitioners pray for the issuance of a writ of certiorari to the Michigan Supreme Court.

Respectfully submitted,

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*Counsel for Petitioners*

# APPENDIX

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## APPENDIX A

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
*Plaintiffs-Appellants,*

v. 58489

SUN OIL COMPANY, a New Jersey corporation,
*Defendant-Appellee.*

COA 24198
LC X-68-1597

**AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 18th day of August in the year of our Lord one thousand nine hundred and seventy-six.**

**Present the Honorable**

**Thomas Giles Kavanagh,**
**Chief Justice,**

**G. Mennen Williams,**
**Charles L. Levin,**
**Mary S. Coleman,**
**John W. Fitzgerald,**
**Lawrence B. Lindemer,**
**James L. Ryan,**
**Associate Justices**

On order of the Court, the application for leave to appeal is considered, and the same is hereby DENIED, because the appellants have failed to persuade the Court that the questions presented should be reviewed by this Court.

Defendant-appellee's motion to dismiss or to summarily affirm becomes thereby moot, and the same is accordingly DENIED.

Defendant-appellee's motion to assess punitive costs and damages for a vexatious appeal is considered, and the same is hereby DENIED.

STATE OF MICHIGAN—ss.

I, Harold Hoag, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 18th day of August, in the year of our Lord one thousand nine hundred and seventy-six.

(s) Corbin R. Davis,
Deputy Clerk

## APPENDIX B

### MESHRIY v. SUN OIL COMPANY

1. Appeal and Error — Briefs — Abandonment of Issues.
   Any issues which are neither raised nor briefed on appeal are considered abandoned.
2. Constitutional Law — Due Process of Law — Trial.
   Due process of law requires a fair trial and a fair determination of a controversy.
3. Trial — Trial Judges — Prejudice — Appeal and Error.
   Actual proof of claimed prejudice must be shown when an appellate court is reviewing the activities, whether judicial or nonjudicial, of a trial judge, and when none is forthcoming the appellate court must find that no violation of due process has occurred; where an appellant claims to have been prejudiced by a letter sent to and read by the trial judge but the appellant has failed to show that the trial judge was influenced by anything other than the evidence duly entered on the record, no violation of due process has occurred.



Appeal from Macomb, Frank E. Jeannette, J. Submitted January 8, 1976, at Lansing. (Docket No. 24198.) Decided March 9, 1976. Leave to appeal applied for.

Complaint by William Meshriy and Mursell Meshriy, his wife, against Sun Oil Corporation seeking reformation of a lease. Plaintiffs' motion for a new trial, made after trial but prior to judgment, was granted. The trial court later vacated the order for a new trial, *sua sponte*, and entered a judgment of no cause of action in favor of the defendant. Plaintiffs appeal. Affirmed.

*Robert J. Lord*, for plaintiffs.

*Robert E. Childs*, for defendant.

Before: DANHOF, P.J., and V. J. BRENNAN and M. J. KELLY, JJ.

DANHOF, P.J. On April 17, 1968, the plaintiffs brought the present action seeking reformation of a lease that they entered into with the defendant. Subsequent to the trial, but before judgment was entered in this matter, the plaintiffs filed a motion for a new trial on January 29, 1973. The motion was granted by the trial court in an order filed May 14, 1973. However, on November 1, 1973, the trial court vacated the above order *sua sponte* and entered a judgment of no cause of action as to the plaintiffs. The plaintiffs then made a second motion for a new trial, which was denied by the trial court on April 21, 1975.

The plaintiffs next moved the trial court pursuant to GCR 1963, 812.2(a) to permit the plaintiffs to transmit less than the full transcript of testimony on appeal. In the motion, the plaintiffs stated they would appeal from the order denying their second motion for a new trial. Further, the plaintiffs indicated they would limit the appeal to three

questions. Finally, only those transcripts subsequent to the plaintiffs' first motion for a new trial were requested for this appeal.[1] The trial court granted the plaintiffs' motion for the record on appeal.

The plaintiffs have raised three issues on appeal.[2] For obvious reasons, responding to the third issue answers

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[1] The plaintiffs stated that "the only possible transcripts of hearings pertinent, material and necessary for review" were as follows:

"the transcripts of hearings subsequent to the plaintiffs' first motion for a new trial upon federal due process grounds filed on January 29, 1973, particularly (a) the hearing on April 16, 1973 when the Court granted the plaintiffs' motion for a new trial and dictated the reasons therefor, (b) the hearing on November 19, 1973 when judgment was entered in the defendant's favor over the plaintiffs' objections and (c) the hearing on January * * * [20], 1975 when the Court denied plaintiffs' second motion for a new trial on federal due process grounds and dictated the reasons therefor." Plaintiffs' motion, filed May 8, 1975.

[2] The issues raised on appeal are stated by the plaintiffs as follows:

I.

"Is a state trial court proceeding subject to the reach and force of the Due Process Clause of the 14th Amendment to the United States Constitution?

II.

"Did the plaintiffs-appellants present and save a substantial federal claim and question for review?

III.

"Did the trial judge deprive plaintiffs-appellants of a fair trial in a fair tribunal, as guaranteed by the 14th Amendment, when he first entered an order granting them a new trial upon a due process motion therefor prior to any opinion or judgment on the merits, and then (a) received and entertained without notice a witness' letter of complaint



the first two. Any issues not expressly abandoned on appeal by the above actions of the plaintiffs will be considered abandoned in any event because plaintiffs have neither raised nor briefed and supported further issues. *Mitcham* v *Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959. See also *Opal Lake Association* v *Michaywe Limited Partnership*, 47 Mich App 354, 366; 209 NW2d 478 (1973), and *Taylor* v *Klahm*, 40 Mich App 255, 269; 198 NW2d 715 (1972).

Concisely stated, the issue raised is whether the trial court was so prejudiced by a witness's letter, which was critical of the court, that the plaintiffs were thereby denied a fair trial in a fair tribunal as required by due process of law.

Due process of law requires a fair trial and a fair determination of the controversy. *Napuche* v *Liquor Control Commission*, 336 Mich 398; 58 NW2d 118 (1953), *Milford* v *People's Community Hospital Authority*, 380 Mich 49; 155 NW2d 835 (1968).

As to the showing required on review, *Wayne County Prosecutor* v *Doerfler*, 14 Mich App 428, 441; 165 NW2d 648 (1968) stated:

> "An appellate court must demand actual proof of claimed prejudice when reviewing the non-judicial activities of a judge, and when none is forthcoming that court must find that no violation of due process has occurred."

---

[2] (Continued)

and accusation so disparaging against the judge for granting a new trial as to make him an interested party, (b) then entered an order adjourning trial until the next trial call after expressing ambiguous concern about said letter to counsel in chambers without disclosing contents thereof, and (c) then without notice, trial, motion or any hearing on the merits subsequent to the said order granting a new trial, the accused Judge *sua sponte* filed an opinion permitting judgment to be entered against plaintiffs-appellants as pleaded by said witness in his said complaining and accusatory extrajudicial letter?"

*Irish* v *Irish*, 59 Mich App 635, 639; 229 NW2d 874 (1975), indicates that actual proof of claimed prejudice must also be shown "where the judicial activities of a judge are involved."

A review of those transcripts requested by the plaintiffs for this appeal fails to show any proof of the claimed prejudice on the part of the trial judge as a result of the letter. Quite the contrary, the trial judge consistently maintained that his decision to set aside the order granting the plaintiffs' motion for a new trial and enter a judgment for the defendant was based upon his finding from the testimony that the plaintiffs had failed to carry the burden of proof. As the plaintiffs have failed to show that the trial judge was influenced by anything other than the evidence duly entered on the record, we find no violation of due process has occurred.

Affirmed. We do find, however, that the unfortunate delay below was not attributable to either party and we therefore decline to award costs.

## APPENDIX C

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
*Plaintiffs-Appellants,*

v.

SUN OIL COMPANY, a New Jersey corporation,
*Defendant-Appellee.*

COA 24198
LC X-68-1597

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Lansing, on the 30th day of April in the year of our Lord one thousand nine hundred and seventy-six.



Present the Honorable

Robert J. Danhof, C.J.
Presiding Judge

Vincent J. Brennan,
Michael J. Kelly,
Judges

In this cause an application for rehearing has been filed by the plaintiffs-appellants and answer in opposition thereto having been received, and due consideration thereof being had by the Court,

IT IS ORDERED that the motion for rehearing be, and the same is hereby DENIED.

---

STATE OF MICHIGAN—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

(SEAL)

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 4th day of May in the year of our Lord one thousand nine hundred and seventy-six.

(s) Ronald L. Dzierbicki,
Clerk

## APPENDIX D

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
*Plaintiffs,*
v. Case No. X-68-1597

SUN OIL COMPANY, a
New Jersey Corporation,
*Defendant.*

### OPINION OF TRIAL COURT

This action was filed April 17, 1968. Plaintiff Meshriy seeks as to Count I to have certain instruments, more particularly identified as Exhibits A, B, C, and D, rescinded, or cancelled, or both, and adjudging the same to be null and void.

As to Count II, Plaintiff seeks to have Exhibits B and E Land Leases reformed so as to express, contain and embody the agreement and the intentions of the parties.

Defendant Sun Oil denies any mistake or fraud was perpetrated by defendant or its agents upon plaintiffs at any time.

It is interesting to note the calendar entries which are incorporated by reference as this courts Addendum "A" to this opinion. The four pages clearly indicate the many motions, hearings and days of trial spent on this matter. The entries further emphasize the perplexities and complications this Court encountered in its effort to attempt to resolve and/or try this matter.

Delays in the trial were occasioned by several reasons:

1. Death of Mrs. Lord, wife of Plaintiff attorney.
2. Death of Mrs. Childs, wife of Defendant attorney.



3. Hospitalization for surgery of trial Judge.
4. Several requests for adjournments by either plaintiff attorney or defendant attorney, or both, for various reasons.

Further, it should be noted that the matter has been before the Court on numerous occasions for settlement conferences; but, due to the antagonism of the principles, it has been impossible for this Court to accomplish amicable resolution of the matter. Further, the multitudinous pleadings and seemingly endless motions prior to trial, during trial, and subsequent to trial have created a maze, to say the least.

The Court, having heard all of the testimony to be offered in this case, as the tryer of fact, determines, as stated above, that the sole question to be determined is whether or not co-plaintiff, MURSELL R. MESHRIY, did, in fact, sign the lease and the memorandum thereof.

The Court did, on May 14, 1973, order a new trial on the motion of the plaintiff.

That on September 26, 1973, the Court, in a conference with counsel for the plaintiffs and defendant, advised them Sua Sponte that said order is being set aside for the reason that no further information can be gained by another trial in this cause. That this Court has had the benefit of months and seemingly years of the trial of this cause. The Court, as tryer of the fact, must arrive at a decision.

The Court has had the benefit of the testimony of witnesses, including MURSELL R. MESHRIY and, likewise, the testimony of the subscribing witness, W. C. Mason. It is the conclusion of the Court, after having benefit of the testimony of the witnesses in open Court and having made its observation of the nature of the testimony, the conduct of the witnesses, and their general recollection of the events, that MURSELL R. MESHRIY did, in fact, sign the lease and the memorandums thereof. The plaintiffs in this cause of action had the burden of showing through a preponderance of the proof that the signature was not, in fact, that of the plaintiff or, in the alternative,

that it was obtained through fraud or misrepresentation. The Court, as tryer of the fact, does not find that such is the case. It appears that it is a question of the plaintiff making a poor economic bargain; and, as the result of hindsight, attempting to challenge it on various bases above discussed. The Court does not find that there is a preponderance of proofs offered by the plaintiff that MRS. MESHRIY, IN FACT, did not sign the lease; or, in the alternative, that her signature was obtained by fraud or misrepresentation.

It should be noted that during the course of a trial, it clearly appeared that the testimony of one of the plaintiffs, MURSELL MESHRIY was, in many areas, completely contradictory to the testimony of WALTER C. MASON, one of the defendants witnesses. During one of the many in chamber discussions a polygraph examination was discussed and finally agreed to. Both attorneys were instrumental in the selection of Robert C. Cummins who gave the polygraph examination. After the examination and the results announced, plaintiffs attorney objected to the findings, stating he did not have an opportunity to cross-examine Mr. Cummins. Mr. Cummins was brought into court and Mr. Lord had the opportunity of examining Mr. Cummins. Although aware of the polygraph finding, it should be noted that this Court in no way considers the result thereof. This Court had arrived at a determination solely predicated upon the facts and testimony offered in open Court, but had hoped that the parties could avail themselves of this means to satisfy themselves in this dispute.

The Court feels a duty, as above indicated, to render this decision and vacate the order for new trial Sua Sponte predicated on the above facts. It should be noted that this Court has reviewed the transcripts of the greater part of the testimony offered in this cause prior to the entry of this opinion. It being conservative to estimate that the transcripts comprise the essential testimony of the various parties and consist of in excess of five hundred (500) pages. A further trial of the cause could result in no more thorough or comprehensive offering of testimony than that before the Court at this time.



**Therefore, an Order vacating the prior order for new trial should enter. Further, as above stated the Court finds that the plaintiff has not sustained the necessary burden of proof and therefore a Judgment for No Cause of Action as to the Plaintiff shall enter.**

**Said Order and Judgment should be presented or noticed for hearing within ten (10) days from date hereof.**

**Dated: November 1, 1973.**

**(s) Frank E. Jeannette**
**Circuit Judge**

## APPENDIX E

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE

COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
*Plaintiffs,*

v. File No. X-68-1597

SUN OIL COMPANY, a
New Jersey Corporation,
*Defendant.*

### FINAL JUDGMENT FOR DEFENDANT

**At a session of said Court held at the Macomb County Court Building in the City of Mount Clemens, Michigan, on this 19th day of November, 1973.**

**PRESENT: HONORABLE FRANK E. JEANNETTE,**
**Circuit Judge**

**The court having signed and filed its Opinion dated November 1, 1973, and following a trial of ten days without**

a jury and the court reciting in its Opinion the findings of fact, counsel for the respective parties having presented oral and written arguments to the court, and the court having read the testimony of the various parties and witnesses (the transcript of which was in excess of 500 pages), and after a thorough review of the large number of exhibits filed in this case and prior motions,

IT IS HEREBY ORDERED AND ADJUDGED that the verdict of the court as embodied in its Opinion dated November 1, 1973, upon motion of counsel for defendant, since the plaintiffs have not sustained the necessary burden of proof, that a final judgment for the defendant and against the plaintiffs be and is hereby entered.

IT IS FURTHER ORDERED AND ADJUDGED that costs be taxed for defendant against plaintiffs in the sum of $175.00.

(s) Frank E. Jeannette
Circuit Judge

## APPENDIX F

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

William Meshriy and
Mursell R. Meshriy, his wife,
*Plaintiffs.*

v. Case No. X-68-1597

Sun Oil Company, a
New Jersey Corporation,
*Defendant.*

ORDER GRANTING NEW TRIAL

At a session of said Court held at the Macomb County Building in the City of Mount Clemens, Michigan, on May 14, 1973.



PRESENT: HON. FRANK E. JEANETTE, Circuit Judge

The plaintiffs' motion for a new trial having been brought on for hearing; and counsel for the parties having been heard and the Court being fully advised in the premises and having dictated a statement of reasons for granting plaintiffs' motion.

Now, therefore, on the motion of Robert J. Lord, attorney for the plaintiffs,

IT IS ORDERED that the plaintiffs be and they hereby are granted a new trial.

Frank E. Jeannette
Circuit Judge

## APPENDIX G

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

William Meshriy and
Mursell R. Meshriy, his wife,
*Plaintiffs,*

v. Case No. X-68-1597

Sun Oil Company, a
New Jersey Corporation,
*Defendant.*

ORDER DENYING NEW TRIAL

At a session the Macomb County Circuit Court held this 21st day of April, 1975, before the Hon. Frank E. Jeannette.

ORDER DENYING RE-NOTICE OF HEARING OF MOTION AND REQUEST FOR SEPARATE MOTION RECORD AND DENYING ORDER FOR NEW TRIAL

Plaintiffs, appearing by their attorney, Robert J. Lord, defendant, appearing by its attorney, Robert E. Childs, after oral argument having been heard thereon; the plaintiffs' motion for a new trial having been brought on for hearing; and counsel for the parties having been heard and the Court being fully advised in the premises and having dictated a statement of reasons for denying plaintiffs' motion;

Now, therefore, on the motion of Robert E. Childs, attorney for the defendant,

IT IS ORDERED that the plaintiffs' motion for a new trial is hereby denied.

(s) Frank E. Jeannette
Circuit Judge

## APPENDIX H

(RECEIVED — Aug. 31, 1973; T. M. Kavanagh, C.J.)

31517 Kelly
Fraser, Michigan 48026

August 30, 1973

Honorable Chief Justice
Thomas A. Kavanaugh
Supreme Court Justice
State of Michigan
Lansing, Michigan

Dear Sir:

I have mixed feeling as I write this letter and it is because I have always had the highest regard for the judiciary but with my latest experience my feelings have changed drastically.



Let me explain the situation. Back in 1966 I worked for the Sun Oil Company covering an area from East of Woodward Avenue in Detroit from the Detroit River North to Port Huron, Michigan. My job was to acquire sites for service stations, either by purchase or lease. At the corner of 12 Mile-Gratiot, (Northwest corner) I developed a land lease. At the time of the signing of the lease I witnessed the signature of a Mrs. Meshriy, then had Mr. Meshriy sign in my wife's presence as lessee at my home, then notarized the signatures. This action is the crux of the plaintiffs' case but this is not why I am writing you. We went to trial before Judge Jeannette, Macomb Circuit Judge, Mt. Clemens, Michigan. After three straight weeks of testimony by both sides and approximately fourteen months of on again, off again tactics the trial finally concluded — there was no jury. In the latter stages of the trial it was decided by all parties that a polygraph test should be given Mrs. Meshriy and myself the results of which were to be a guide to the Judge. Needless to say the results of my test were positive and the opposition very negative. I don't know if this caused Judge Jeannette problems but in the final analysis there was no decision rendered by him and none to date. In the meantime he has stated that a new trial would be started September 26th, 1973. I am not a lawyer but it seems to me that he should have made a decision before granting a new trial. This is why I am writing you. The attorney for Sun Oil is reluctant to do or say anything for fear of antagonizing the Judge and of course the other attorney has another chance of presenting a new case with hopes of doing a better job.

Another little item, I no longer work for Sun Oil Company, but, because I am a principal in the litigation I am a star witness. After my attorney informed the Judge that I was no longer in the employ of the Sun Oil Company and that it wasn't right for me to have to spend so much time in Court without some reimbursement to my present employer, the Judge's remark was "Mr. Mason will get his reward in Heaven."

I realize that I can reap the displeasure of my former company's attorney as well as the Judge and for that matter

you, yourself. I just can't believe that our judicial system is so mired down in politics that when and if a Judge is out of line there is no recourse for anyone to have him straightened out. I feel Judge Jeannette is wrong and out of line in his action. He should give a decision because everything that could be said has been said, a new trial will accomplish nothing. I understand that he may hear the same trial again, no other Judge would consider hearing this case after fourteen months, I am certain.

If I am wrong I apologize for bothering you but if what the Judge has done and is doing is not procedurally correct then I think he should be reprimanded accordingly. I may be wrong in taking this approach but if the judiciary system is to work for all people then the responsible people in the system, more particularly the judges, should be firm and competent and fair in their decisions and actions. I attach hereto a copy of the first page of the transcript so as to give you the pertinent information you may need.

I would appreciate an answer from you one way or another but soon. Thank you for your patience and understanding in this matter.

Sincerely,

(s) Walter C. Mason
Walter C. Mason

## APPENDIX I

Supreme Court
Office of the Court Administrator
Law Building - Box 88
Lansing, Michigan 48901

September 4, 1973

Mr. Salvatore Crimando
Court Administrator
County Building
Mt. Clemens, Michigan 48043



Re: William Meshriy and Mursell Meshriy, His wife, vs.
Sun Oil Company, a New Jersey Corporation
Macomb County File No. X68-1597

Dear Sam:

We are enclosing a copy of a complaint letter written to the Chief Justice by Walter C. Mason regarding captioned case.

Could you please inform us of the facts in this case so that we can intelligently reply to Mr. Mason's letter of August 30?

We appreciate your usual fine assistance in these matters.

Cordially,

(s) Austin,
Deputy Court Administrator

AJD:eb
Enclosure
cc: Hon. Thomas M. Kavanagh

## APPENDIX J

State of Michigan

In the Circuit Court for the County of Macomb

No. X-68-1597

MESHRIY,
*Plaintiff.*

vs.

SUN OIL CO.,
*Defendant(s).*

Atty: R. Lord
8388 Dixie Hwy. Fair Haven

Atty: W. Jackson
25191 Gratiot, Roseville

Atty: R. Childs
P.O. Box 2205, Dearborn

ORDER

( ) OF DISMISSAL

(x) FOR ADJOURNMENT

( ) FOR COSTS

At a session of said Court, held in the City of Mount Clemens, on Sept. 26th, 1973.

This cause having been regularly noticed for ( ) Discovery Pre-Trial, ( ) Pre-Trial Conference, (x) Trial, ( ) Motion for....., and having been called, and

( ) The (Plaintiff) (Defendant) having failed to attend;

( ) (Plaintiff's) (Defendant's) All counsel having requested an adjournment;

( ) it appearing that service has not been had upon the defendant(s);

( ) it appearing that the matter has been settled;

*Criminal jury trial in progress*

( ) The Motion is (granted) (denied).

( ) Now therefore, IT IS ORDERED,
that this (motion) (cause) be, and the same is hereby DISMISSED, (without) (with) prejudice.

(x) Now therefore, IT IS ORDERED,
that this cause be, and the same hereby is, ADJOURNED to *next trial call.*

( ) IT IS ORDERED
that costs be, and the same hereby are, assessed against (Plaintiff) (Defendant) in favor of the (Plaintiff) (Defendant) (County) in the amount



of $.....dollars, payable within..... days from this date.

(s) Frank E. Jeannette
Circuit Judge

## APPENDIX K

(Letterhead of The Sixteenth Judicial Circuit of Michigan)

September 28, 1973

Mr. Austin J. Doyle
Deputy Court Administrator
Supreme Court
Lansing, Michigan 48901

Re: William Meshriy and Mursell Meshriy, his wife, vs. Sun Oil Company, a New Jersey Corporation
File: X-68-1597

Dear Austin:

I must first apologize for the delay in responding to your letter concerning the above, but because of the Judicial Conference as well as Judge Jeannette's involvement in a prolonged homicide trial, we were unable to sit down to discuss this matter.

There were many delays in the trial of this matter caused in part by Judge Jeannette's illness and the deaths of the wives of both counsel. Further delays were necessitated by the inability of counsel to appear because of conflicts in scheduling. As recently as two weeks ago, when Judge Jeannette attempted to meet with counsel, he was rebuffed again because of conflicts in schedule and the remarriage of one counsel. He, however, did meet with counsel on September 26th and informed them that for the past few weeks he had been seriously considering setting aside his

Order for new trial and entering an Opinion Sua Sponte, based on the testimony already heard.

If the Judge decides to take this action, this will eliminate the necessity of a re-trial. I am sure the Judge will give this his prompt attention upon completing the murder case which is now in its fifth week.

If I can be of further assistance, please call upon me.

Very truly yours,

Salvatore Crimando
Court Administrator

SC/mas
cc: Honorable Frank E. Jeannette

## APPENDIX L

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF MACOMB

WILLIAM MESHRIY and
MURSELL R. MESHRIY, his wife,
*Plaintiff,*

v. No. X-68-1597

SUN OIL COMPANY, a New Jersey
corporation,
*Defendant.*

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Proceedings had before the HONORABLE FRANK E. JEANNETTE, P15474, Circuit Judge, Mount Clemens, Michigan, on Monday, January 20, 1975.



APPEARANCES:

ROBERT LORD, Esq.
*Attorney at Law*
Appearing for and on behalf of the Plaintiff:

ROBERT CHILDS, Esq.
*Attorney at Law*
Appearing for and on behalf of the Defendant:

• • •

(6)

MR. LORD: Just sticking to the five minutes as was the case in the Plaintiff's first motion for new trial which was granted by Your Honor by an order entered May 14, 1973, the present motion is grounded, particularly on a federal claim, that is that the Plaintiffs were denied a fair trial before a fair disinterested and impartial tribunal as guaranteed by the due process clause of the 14th Amendment. This is the question we will take on appeal. This is why I'm interested in a special record on this particular question.

• • •

## APPENDIX M

STATE OF MICHIGAN
IN THE COURT OF APPEALS

WILLIAM MESHRIV and
MURSELL MESHRIV, his wife,
*Plaintiffs-Appellants,*

v. No. 24198

SUN OIL COMPANY, a New Jersey
corporation,
*Defendant-Appellee.*

### APPLICATION FOR REHEARING

The plaintiffs-appellants by their attorneys hereby make their application for a rehearing of this action on appeal on the substantial ground that this Court, clearly as shown by its March 9, 1976 opinion, erroneously applied state instead of the correct federal standards in deciding the federal due process claim which was presented and saved below, and in this Court of Appeals, for federal review for the following reasons:

1. Michigan courts, trial and appellate, have the solemn responsibility equally with the federal courts to guard, enforce and protect every right granted or secured by the Constitution of the United States. *Allee* v *Medrano*, 416 US 802, 835 (1974), Mr. Chief Justice Burger, joined by Mr. Justice White and Mr. Justice Rehnquist, concurring in the result in part and dissenting in part, citing *Steffel* v *Thompson*, 415 US 452, 460-461 (1974) and *Robb* v *Connolly*, 111 US 624, 637 (1884).

2. The Michigan Supreme Court (*In re Oliver*, 318 Mich 7 (1946)) applied state instead of federal standards in rejecting a federal due process claim and was consequently reversed by the United States Supreme Court. *In re Oliver*, 333 US 257 (1947).



3. The Michigan Supreme Court (*In re White*, 340 Mich 140 (1954), and *In re Murchison*, 340 Mich 151 (1954)) applied state instead of federal standards in rejecting another federal due process claim and was consequently, on certiorari, reversed again by the United States Supreme Court. *In re Murchison*, 349 US 133 (1955).

4. In *Joint Anti-Fascist Refugee Committee* v *McGrath*, 341 US 123 (1950), Mr. Justice Frankfurter, concurring, said at 162-163:

> "... "(D)ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decision, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

and at 174:

> "... Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances."

5. To perform its high function in the best way justice must satisfy the appearance of justice. *Murchison, supra,* at 136.

6. This appeal does not involve a GCR 1963, 405 motion claim or question, subrule 405.1(3) providing: ". . . The judge shall be deemed disqualified to hear the action when the judge: . . . (3) is personally biased or prejudiced for or against any party or attorney . . ."

7. State standards involving GCR 1963, 405 motions to disqualify a judge, such as concerned this Court of Appeals in *Wayne County Prosecutor* v *Doerfler*, 14 Mich App 428 (1968) and *Irish* v *Irish*, 59 Mich App 635 (1975), are wholly unrelated and wholly irrelevant to federal standards applied by federal courts to guard, enforce and protect rights granted and secured by the Due Process Clause of the Fourteenth Amendment.

8. The particular state concerns and reasoning of *Irish, supra,* at 639 (". . . Actual proof of prejudice must be presented before a trial judge will be disqualified.") are wholly unrelated and wholly irrelevant to the federal due process claim presented and saved below for review by federal and not state standards.

9. The record of this action as appealed excludes review of any state question.

10. The solemn responsibility of this appellate court and the majesty of the Due Process Clause of the Fourteenth Amendment combine strongly to urge rehearing with or without oral argument as this Court may deem appropriate.

(s) Robert J. Lord
8388 Dixie Highway
Fair Haven, Michigan 48023
725-4231

*Attorney for Plaintiffs-Appellants*

Dated: March 29, 1976



## APPENDIX N

## STATE OF MICHIGAN
## IN THE SUPREME COURT

WILLIAM MESHRIY and
MURSELL MESHRIY, his wife,
*Plaintiffs-Appellants,*

v. No. 58489

SUN OIL COMPANY, a New Jersey corporation,
*Defendant-Appellee.*

C/A No. 24198
L.C. No. X68-1597

## APPLICATION FOR LEAVE TO APPEAL

Plaintiffs-appellants make this application for leave to appeal from a final decision of the Court of Appeals (copy attached) upon appeal of right from the trial court's order (copy attached) presenting three federal due process claims and questions timely saved in the trial court for state and federal review.

### MERITORIOUS BASIS FOR APPEAL

Plaintiffs-appellants submit that they herein show a meritorious basis for appeal because they seek to vindicate in a state court their personal rights to a fair trial in a fair state tribunal as guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution as did the state litigant in *Crampton* v *Department of State*, 395 Mich 347 (1975).

*Appendix N*

GROUNDS

Plaintiffs-appellants further make this application upon the following GCR 1963, 853.1(1)(2)(3) grounds:

1. The federal due process subject matter of the appeal involves a legal principle of major significance to the jurisprudence of the State because state courts, equally with the federal courts, have the solemn responsibility to protect and enforce every right secured by the federal constitution.
2. The decision of the Court of Appeals is clearly erroneous because an irrelevant state standard was applied to the main federal due process claim and question presented.
3. The decision of the Court of Appeals will cause the plaintiffs-appellants material injustice because they will be denied a fair trial in a fair state tribunal.
4. The decision of the Court of Appeals is in conflict with decisions of this Supreme Court.

• • •

IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-669

**WILLIAM MESHRIY and**
**MURSELL MESHRIY, his wife,**
**Petitioners,**

**v.**

**SUN OIL COMPANY,**
**a New Jersey corporation,**
**Respondent.**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

**ROBERT E. CHILDS**
**P.O. Box 2205**
**301 River Lane**
**Dearborn, Michigan 48123**
**313-563-3210**
**Counsel for Respondent**

THE INLAND PRESS, DETROIT, MICHIGAN

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## CITATIONS

**Federal:**



**State:**

IN THE

# Supreme Court of the United States

October Term, 1976

No. 76-669

**WILLIAM MESHRIY and**
**MURSELL MESHRIY, his wife,**
**Petitioners,**

**v.**

**SUN OIL COMPANY,**
**a New Jersey corporation,**
**Respondent.**

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

William Meshriy and Mursell Meshriy, his wife, the petitioners, prayed that a writ of certiorari be issued to the Michigan Supreme Court (the highest court of Michigan in which a decision can be had) to review an order denying the petitioners leave to appeal (and in effect finally affirming) a judgment of the Michigan Court of Appeals.

Respondent opposes the granting of certiorari for (1) The issue was not presented in the original pleadings. All the evidence was entered and the trial ended. Petitioner then, for the first time, raised the issue in a pleading upon which the instant petition for certiorari is requested.

(2) It is not meritorious.

(3) It presents no substantial Federal question.

### OPINIONS AND ORDERS BELOW

The order of the Michigan Supreme Court denying the petitioners leave to appeal is printed in Appendix A, Pages 1a-2a. (The Appendix is a part of petitioners' application)

The opinion of the Michigan Court of Appeals, whose judgment finalized and affirmed in effect by the Michigan Supreme Court herein sought to be reviewed, is printed in Appendix B, Pages 2a-6a, and is reported at 67 Mich. App. 709 (1976). (No unofficial report citation as yet)

The order of the Michigan Court of Appeals denying the petitioners' application for rehearing is printed i. Appendix C, Pages 6a-7a.

The opinion and judgment of the trial court of first instance are printed in Appendix D and in Appendix E, Pages 8a-11a, and Pages 11a-12a, respectively.

The pertinent pre- and post-judgment orders of the trial court of first instance are printed in Appendix F and in Appendix G, Pages 12a-13a and Pages 13a-14a, respectively.

## JURISDICTION

The petitioners' application for leave to appeal was denied by the Michigan Supreme Court on August 18, 1976 (Appendix A, Pages 1a-2a). The judgment of the Michigan Court of Appeals was entered March 9, 1976 (Appendix B, Pages 2a-6a). The petitioners' application for rehearing was denied by the Michigan Court of Appeals on April 30, 1976 (Appendix C, Pages 6a-7a). The purported jurisdiction of this Supreme Court to issue the requested writ of certiorari is conferred by 28 U.S.C. §1257(3).

However, petitioner's assertion based upon 28 U.S.C.A. 1257(3) brought in the due process question for the very first time *after the trial was completely over.* (Emphasis supplied) At no time did it appear in the original pleadings, namely, Complaint, Answer, Reply or Motions until the issue of rendering a decision was made as a result



of the letter set forth in petitioners' Appendix H, Pages 14a-16a. Hence, it was not timely raised. However, again it is reiterated that none of the pleadings contain a due process question until after the trial was completely over.

## COUNTER-STATEMENT OF QUESTIONS INVOLVED

### I.

Does the subject matter of the appeal involve a legal principle of major significance to the jurisprudence of the State of Michigan or of the United States?

Plaintiffs-appellants contend the answer should be "Yes".

Defendant-appellee contends the answer is "No".

The Court of Appeals did not so consider this but stated that the issue raised is "whether the trial court was so prejudiced by a witness's letter, which was critical of the court, that the plaintiffs were thereby denied a fair trial in a fair tribunal as required by due process of law." (Paragraph 2, Page 2, of Court of Appeals Opinion). This letter appears in Petitioner's Appendix H, Pages 14a-16a.

### II.

Is the decision of the State Court of Appeals in conflict with decisions of this Supreme Court and does it raise a Federal Question?

Plaintiffs-appellants contend the answer should be "Yes".

Defendant-appellee contends the answer is "No".

## A CONSTITUTIONAL PROVISION IS NOT INVOLVED

This case does not involve the Due Process Clause of the first section of the Fourteenth Amendment to the Constitution of the United States.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

> citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property with due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Counter Statement of the case which follows shows that the issue actually is: Was the Circuit Trial Judge forced to make a decision in favor of defendant simply because of a letter written to the Michigan Supreme Court after the trial was over by a witness begging for a decision either way—either he was a forger and a perjurer or he was not?

## COUNTER-STATEMENT OF THE CASE

Plaintiffs filed, on April 17, 1968, their equitable action in the Macomb Circuit requesting a rescission of a certain lease containing an option to purchase. William Meshriy and Marsell Meshriy, plaintiff, owned the real estate and the lessee was the Sun Oil Company. The attorney was Wilson M. Jackson of Roseville, Michigan.

On September 21, 1970 plaintiffs filed an Amended Complaint with no objection being made by defendant.

The pre-trial deposition of Walter C. Mason, an ex-employee of Sun Oil Company, was taken by another attorney, Mr. Walker Saunders.

The case was tried by Robert J. Lord, Esq., for the plaintiffs.:

The issues may be summarized from the Amended Complaint, Answer, and simplified as follows:

(1) Did Walter C. Mason sign Mrs. Meshriy's name to a 15-year lease with a rental of $800 per month, the right to renew for three consecutive five-year periods at



$850 rental per month or instead of renewing, at the end of ten years, at defendant's option, purchase the northwest corner of Gratiot and Twelve Mile Roads for $175,000?

(2) Were the initials which appeared in the lease forged initials?

(3) Was the typed-in rental amount of $800 and $850 renewal to average out for the entire period, including renewals, for the sum of $1200 per month?

Mathematically the lease with option to purchase shows that plaintiffs would have received as rent $800 per month for fifteen years which amounted to $144,000. If the three five-year options were exercised, by defendant, this would have yielded an additional $153,000 or a total rental for thirty years of $297,000. These executed leases required defendant to demolish the existing station and restaurant, to build a new station, and to pay all insurance and taxes, except special assessments.

Previously, Mr. Meshriy delivered to Mr. Mason an offer to sell to Sun Oil the existing site for $99,990. However, Mr. Mason did not bother sending the purchase agreement to the home office of Sun Oil Company because "Mr. Meshriy informed me that his wife's signature was not a legal signature and that he had signed her name to it."

Dividing the total (net-net) rent for thirty years, results in dividing $279,000 by 360 months, or averaging $825 per month (net-net). The lease, in addition, had the option to purchase at the end of ten years for $99,990. Eventually, a lease was executed for $800 per month for 15 years, an option to renew for three five-year periods, with an option to purchase for $175,000. Again, it was a "net-net" lease.

The lease had typed in the name of the individuals and

the witnesses thereto. Apparently, William Meshriy's name was written thereon (which he has never denied), but the name of his wife, plaintiffs specifically complain, was written in by Walter C. Mason, then the employee of Sun Oil Company. The witnesses to the document were Walter C. Mason as to Mrs. Meshriy's signature, and his wife Anna Mason, witnessed Mr. Meshriy's signature. The reason was that the Mason's residence at which Mr. Meshriy signed was very near the Meshriy's home, so that Anna Mason could witness Mr. Meshriy's signature. The document was notarized by Walter C. Mason.

The lease was dated September 27, 1966.

The Sun Oil Company tore down the combined existing service station and restaurant and at its own cost, constructed a new retail Sun outlet. It also paid $800 per month, from October 27, 1966, to April 17, 1968, *being approximately 18 months, without any objection from the plaintiffs*, even though the instant Complaint was filed on April 17, 1968 in the Macomb Circuit Court asking for reformation and rescission. In fact, the situation *at present* in 1976 is that Sun Oil is still paying $800 per month "net-net", namely, that Sun Oil is paying the Meshriys, who have always accepted it, the sum of $800 per month plus all taxes and insurance, but not special assessments.

On March 17, 1971, the trial before the Honorable Frank Jeannette commenced by plaintiffs calling Walter C. Mason as an ex-employee of the opposite party as an adverse witness. The attorney for defendant became ill that day, and the trial had to be adjourned. It was further adjourned because of the death of defendant attorney's wife.

On October 15, 1971, the trial proofs were concluded. Between the conclusion of the trial proofs and January



28, 1972, the Circuit Judge asked for the aid of a polygraph examiner. *Defendant's counsel* cited every Michigan case, civil and criminal, reported to that day, wherein a polygraph opinion was excluded; nevertheless, the judge was very anxious *because he could not make up his mind as to which side was telling the truth.* (Emphasis supplied) Therefore, it was ordered that the Chicago firm of Reid & Cummins would be contacted in order to fly an examiner to Detroit to administer the tests to Mrs. Meshriy and Mr. Mason. On January 28, 1972, after many hours of testing, in the Macomb County Courthouse, the polygraph examiner, Mr. Robert Cummins, completed the tests. He testified under oath that Mr. Mason was telling the truth and Mrs. Meshriy was not telling the truth. The Statement of Facts by Petitioners herein neglects to point out that on October 11, 1972, the court said:

> "It's further ordered counsel shall be afforded to have an opportunity to cross-examine Robert C. Cummins."

The Court further said to Mr. Lord:

> "Because I thought that you wanted to avail yourself to cross-examine Mr. Cummins. Now, do you or don't you?"
>
> Mr. Lord: "No"
>
> Herein the due process claim was forfeited, if one existed.

On January 29, 1973, plaintiffs, without a judgment having been entered, filed their motion for a new trial, citing that the trial judge under these circumstances could not enter a disinterested and impartial judgment pursuant to due process. *This was the first time a federal claim was raised.*

On April 16, 1973, Judge Jeannette heard and granted

the motion for a new trial. The Order granting a new trial was entered on May 14, 1973.

Further, the pleadings and the docket entries in this case indicated that plaintiff desired the cross-examination of Salvator Crimando, the Macomb County Court Administrator, and Robert E. Childs, attorney for defendant. This particular demand as well as the demand for cross-examination of Mr. Cummins, the polygraph operator, was never done though certainly it could have been arranged. This is the reason why the Honorable Frank Jeannette was really angry about the delays of 14 months in proceeding with this particular case.

On August 30, 1973, Walter C. Mason (who had been cross-examined as an agent of defendant-appellee, without notice to plaintiffs-appellants or counsel for the defendant, forwarded his letter to the late Chief Justice Thomas Kavanagh, complaining against the trial judge for not rendering an opinion. This letter is printed on petitioners' Appendix H, Pages 14a-16a. This apparently is the only due process issue.

September 4, 1973, the Deputy Supreme Court Administrator forwarded the Mason letter and an accompanying investigatory letter tc the Macomb County Court Administrator. (See Appendix I, Pages 16a-17a)

September 26, 1973, the trial judge met with counsel in chambers which was the first time Respondent's counsel heard of it and the following events transpired as described in Paragraph 12 of the December 7, 1973, affidavit in support of plaintiffs-appellants' December 10, 1973, second motion for a new trial (repeating plaintiffs' words):

> "On September 26, 1973, the Honorable Frank E. Jeannette met with counsel of the parties in chambers with the Macomb County Court Administrator pres-



> ent for reasons unknown to plaintiffs' counsel until the Honorable Frank E. Jeannette, without disclosing a copy thereof, stated that he was disturbed concerning a letter of complaint by said Walter C. Mason and that he was considering *sua sponte* setting aside the May 14, 1973 order granting plaintiffs a new trial, the Honorable Frank E. Jeannette otherwise saying in regard thereto that he had been 'sold a bill of goods,' the said meeting with the Honorable Frank E. Jeannette otherwise being confused, abruptly terminated when the Honorable Frank E. Jeannette left his chambers in a matter of only a few minutes, and otherwise inconsequential except for the disturbed appearance of the Honorable Frank E. Jeannette and a statement by the defendant's attorney that said Walter C. Mason was "out of control" or some such phrase; and the Honorable Frank E. Jeannette did not advise plaintiffs' counsel that he was considering *sua sponte* setting the May 14, 1973 order for new trial aside for the reason that no further information could be gained by another trial or that he had the benefit of months and seemingly years of the trial of this action or that he must arrive at a decision, as such matters are referred to by the Honorable Frank E. Jeannette in his November 1, 1973 opinion." (December 7, 1973 affidavit in support of plaintiffs' appellants' motion for new trial filed December 10, 1973.) (Case filed April, 1968)

September 26, 1973, the trial judge entered his Order adjourning the trial in this action to the next trial call for the reason that a criminal jury trial was in progress. (See Appendix J, Pages 16a-17a)

September 28, 1973, the Macomb County Court Administrator forwarded his response to the Deputy Supreme Court Administrator's investigatory letter of September 4, 1973. (See Appendix K, Pages 19a-20a)

On November 2, 1973 the trial judge filed his opinion for defendant dated November 1, 1973. (See Appendix D, Pages 8a-11a)

A Final Judgment for defendant was filed on November 19, 1973 with the necessary proof of service on plaintiffs' attorney, per G.C.R. 812.1(c). (See Appendix E, Pages 11a-12a)

The Order denying Motion for new trial and affirming the November 19, 1973, final judgment for defendant was entered on April 21, 1975. (See Appendix G, Pages 13a-14a) On May 12, 1975 the Claim of Appeal was filed.

On March 9, 1976 the Court of Appeals Opinion written by Presiding Justice Danhof, with Justices V. J. Brennan and M. J. Kelly concurring, held entirely in favor of Judge Jeannette's decision and final order and entered judgment for defendant. (See Appendix B, Pages 2a-6a)

It should be noted that plaintiffs-petitioners also applied for a rehearing. The matter was noticed for hearing on April 13, 1976, being dated March 29, 1976.

Defendant's counsel promptly filed an Answer in Brief in Opposition to Application for Rehearing.

The Court of Appeals denied the application for rehearing on May 4, 1976.

Thereafter plaintiffs-appellants, now with a fourth attorney for the plaintiffs added in this litigation, namely, Mr. Victor Hanson, filed their application to the Michigan Supreme Court for leave to appeal to which was attached a Brief in support thereof.

Defendant's Brief is to refute the arguments contended for (and frankly which counsel for defendant has extreme difficulty in following said argument and hence, the background as to the Counter-statement of Facts and the Counter-statement of Questions).



The mailed opinion from the Clerk of the Court of Appeals, Page 2, first paragraph states:

> "The plaintiffs have raised three issues on appeal[2]. For obvious reasons responding to the third issue answers the first two. *Any issues not expressly abandoned on appeal by the above actions of the plaintiffs will be considered abandoned in any event because plaintiffs have neither raised nor briefed and supported further issues.*" (Citing three cases) (Emphasis supplied)

However, in the revised or Counter-Statement of Questions involved, defendant-respondent prefers to restate the three issues as they are set forth in the Counter-Statement of Questions Involved in question form and in statement form in the argument which now follows: Actually, was the trial judge under these facts frightened into a decision because of a letter to the Michigan Supreme Court by a non-party witness for defendant after the trial was completed? The witness was disturbed to be branded a liar and a forger and simply requested the judge to say publicly whether or not the judge thought him to be a forger and perjurer.

## ARGUMENT IN OPPOSITION TO PETITIONERS' APPLICATION FOR CERTIORARI

### I.

### THE SUBJECT MATTER OF THE APPEAL DOES NOT INVOLVE A LEGAL PRINCIPAL OF MAJOR SIGNIFICANCE TO THE JURISPRUDENCE OF THE STATE OR THE UNITED STATES.

Defendant-respondent agrees that a fair trial in a fair tribunal is a basic requirement of the due process clause

of the 14th Amendment. No facts are actually set forth in the Application for Certiorari, but only generalizations and lists of cases and citations without an analysis of their factual content in order to show wherein a federal question is involved.

In this Application for Certiorari the petitioners-appellants rely upon mere citation and generalizations without any logical analysis.

Because counsel has simply stated in their Brief generalizations, the attorney for defendant-respondent feels that an analysis as to factual content of each of the cases cited is important to show how irrelevant they are to the present Petition for Certiorari.

*In Re Murchinson,* 349 US 133, 75 S St. 623 (1955), was a case wherein a Detroit Police Officer was cited for contempt by a judge-one-man grand jury. The judge was the complaining witness. The court held that it could not have been an impartial tribunal because of the fact that he had pre-determined that the man should be cited for contempt and hence, could not preside over the contempt trial of defendant and petitioner Murchinson.

Petitioners cite *Tumey* v *Ohio,* 273 US 510, 532, 47 S Ct 437 (1927).

Mr. Chief Justice Taft delivered the opinion of the court wherein the mayor of the village presided over trials of a person accused of violation of the state's prohibition act. The statute of Ohio provided that money paid from the fines shall go one-half to the state treasury and one-half to the municipality. In addition, a local ordinance of the village of North College Hill, Ohio, provided that one-half of all of the fines from the State of Ohio Prohibition Act shall be used to enforce the Act, that arresting officers



were allowed a percentage and that "the mayor (judge) of the village of North College Hill, Ohio, shall receive or retain the amount of his costs in each case in addition to his regular salary, as compensation for hearing such cases." If he heard these cases and found for the defendant, no fees or costs would be paid him. The defendant had to be convicted. Otherwise the mayor-judge received nothing. Obviously this was contrary to due process. Such procedure led to the infamous "JP" judgment for the plaintiff. Such a case results in a violation of the Fourteenth Amendment because the mayor-judge had a definite pecuniary interest in convicting the defendant. In citing this case, counsel for the defendant-appellee need ask its relevancy only by asking this question: Wherein did the Honorable Macomb County Circuit Judge Frank Jeanette get a part of any of the proceeds whether paid to any of the parties, the witnesses or counsel therein? The answer is obvious, so obvious that it indicates no substantial federal question being presented because obviously not one cent could ever have been paid or would this Honorable man ever accept any such sum. The very implication in the Petitioner is one which is appalling to defendant's counsel.

*In re Oliver,* 333 US 257, 68 S Ct 499 (1948), (p. 11 of Petition for Certiorari) was certiorari from denial of a Writ of Habeas Corpus. Oliver had been subpoenaed as a witness to testify before a Michigan "one-man grand jury". The Circuit Judge, sitting as the one-man juror, said that Oliver had testified "evasively" and given "contradictory answers" to questions. Without referring it to anyone else, he summarily sentenced him to jail in the secrecy of the grand jury chambers. The witness had no opportunity to defend himself, no kind of notice nor trial at all. Again this case differs from the instant proceedings

in that here there had been a complete trial with a complete right of cross-examination by plaintiffs' attorney, asked of the Court Administrator, of defense counsel and of the chief witness for defendant, the ex-employee of Sun Oil Company, Walter C. Mason, but never availed of even 14 months after the trial had concluded. Had the court simply read the pleadings and then entered the judgment it did, the cases might be analagous. Under the facts, and in accordance with petitioners' argument, due process must be based upon the facts as found, hence the case of *In re Oliver* is not pertinent to the present inquiry. Judge Jeannette was trying to render a worthy decision on only one issue: with each party represented, thorough cross-examination of all witnesses, with plaintiffs having the burden of proof, was Mrs. Meshriy or Mr. Mason telling the truth? This is not a federal question.

Petitioners cite on their Page 11 *Offutt* v *United States,* 348 US 11, 75 S Ct 11 (1954). This was a case in which defense counsel in a U.S. District Court sitting in the District of Columbia apparently had a personal animosity to the trial judge which was most certainly reciprocated. In fact, when he charged the jury the judge said:

> "I also realize you had a difficult and a disagreeable task in this case. You have been compelled to sit through a disgraceful and disreputable performance on the part of the lawyer who is unworthy of being a member of the profession; and I, as a member of the legal profession blush that we should have such a specimen in our midst."

The trial judge sentenced defense counsel to 10 days for contempt. The Court of Appeals, because of the bad attitude of both judge and counsel, reduced it to 48 hours. The U.S. Supreme Court held, in reversing, that the Chief



Judge of the District should assign another judge to sit in the second hearing on the charge for contempt. Messrs. Justices Black and Douglas insisted that he was entitled to a jury trial. Justice Reed and Burton dissented and would affirm the Court of Appeals; Mr. Justice Minton would affirm because of the fact that the Court of Appeals, having reduced the sentence, their actually being a finding of contempt by both Appellate Courts, would dismiss the writ of certiorari as improvidently granted.

*Meshriy* v *Sun Oil Co* was not a running battle between the bench and bar. Far from it. In fact, this counsel feels that the judge leaned over backwards to both members of the bar trying the case for the purpose of seeing that both parties were treated properly. He realized the peculiar position of both attorneys as well as of his own because of deaths and illnesses. This counsel can do nothing but express appreciation rather than condemn the trial judge as one who would be influenced by a single letter, satisfactorily explained to the Supreme Court of the State of Michigan.

The fourth paragraph then cites *Ward* v *Village of Monroeville,* 409 US 57, 93 S Ct 80, (1972).

This was a case wherein defendant was convicted in the mayor's court for two traffic offenses. He appealed to the Court of Common Pleas, the Court of Appeals and the Ohio Supreme Court. Certiorari was granted. The court pointed out that implied bias would be shown by the mayor sitting as a traffic and ordinance judge because:

> "A major part of village income is derived from the fines, forfeitures, costs and fees imposed by him in his mayor's court. Thus in 1964 this income contributed $23,589.50 of the total village revenues of $46,355.38; in 1965 it was $18,508.95 of $46,752.60; in

1966 it was $16,058.00 of $43,585.13; in 1967 it was $20,060.65 of $53,931.43; and in 1968 it was $23,439.42 of $52,995.95. This revenue was of such importance to the village that when legislation threatened its loss, the village retained a management consultant for advice upon the problem." Page 58 of 409 US and Page 82 of 93 Supreme Court Reporter.

The case reversed and the court held that the defendant-petitioner for certiorari was entitled to a neutral and detached judge in the first instance. Reversed and remanded with Mr. Justice White and Mr. Justice Rehnquist dissenting. The dissent pointed out that they could not assume that every mayor-judge would disregard his oath as administrator of justice contrary to constitutional commands, particularly in view of the fact that there were similar statutes in 16 other states. Hence, they would affirm leaving the due process issue on a case-by-case basis.

*People* v *Coleman*, 350 Mich 268, 86 NW2d 281 (1957), was a conviction for attempting to obstruct justice. Coleman had been charged with the violation of the Small Loan Act. His trial date was set. Before the trial started he attempted to get certain witnesses to inform a witness subpoenaed for the people that this witnesses' wife was ignorant of the fact that he had been "running around" with a young woman. He also attempted to have the intermediary pass certain information on *prior to the trial.* This was conduct of a party making an agreement with an intermediary to influence the testimony. The mere facts of the case distinguish it from the instant *Meshriy* v *Sun Oil. Coleman* was prior to the trial to influence the witnesses. Mason's letter was *after* the trial and simply was a letter to the Chief Justice of the Supreme Court requesting that a decision be made by the trial judge who had heretofore



said in effect that *he did not know which way to rule.* The only effect of Mason's letter was to force the trial judge to render an opinion — either for the plaintiff or for the defendant. Nothing else was involved. Appendix H, Pages 14a-16a.

Page 14 of the Petition cites *Betts* v *Brady*, 316 US 455, 462, 91 S Ct 1252 (1942) was certiorari from the Chief Judge of the Court of Appeals of Maryland denying Habeas Corpus and remanding petitioner to the custody of the warden, respondent Betts. At Page 14 petitioner cites this case and says that "an asserted denial of Federal due process is to be tested by the totality of facts of a given case." On Page 1261 of 62 S Ct the Opinion makes this statement:

"In this case there was no question of the commission of a robbery. The State's case consisted of evidence identifying the petitioner as a perpetrator. The defense was an alibi. Petitioner (who had previously asked for Counsel to be appointed for him which had been denied) called and examined witnesses to prove that he was at another place at the time of the commission of the offense. The simple issue was the veracity of the testimony for the State and that for the defendant. As Judge Bohn says the accused is not helpless, but was a man 43 years old, of ordinary intelligence and ability to take care of his own interests on a trial of that narrow issue. He had once before been in a criminal court, pleaded guilty of larceny and served a sentence and was not wholly unfamiliar with criminal procedure. It is quite clear that in Maryland, if the situation had been otherwise and it had appeared that petitioner was, for any reason, at a serious disadvantage by reason of a lack of counsel a refusal to appoint would have resulted in the reversal of a judgment of conviction."

His petition for Habeas Corpus was denied based upon the totality of the facts set forth. Veracity of plaintiffs' versus defendant witnesses' testimony was the only issue set forth.

Petitioners, Page 14, cites *Morgan* v *US,* 304 US 1, 58 S Ct 773 (1938), was a reversal of an Order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stock Yards. Apparently, the first time the case was before the U.S. Supreme Court in 298 US 468, 56 S Ct 906, there had been struck from plaintiff's bill the allegations that the Secretary had made the order without having heard or read the evidence and that his sole information was derived from consultation with the employees of the Department of Agriculture. That was held error and thereafter the Bills were amended and Interrogatories were directed to the Secretary of Agriculture, Rexford G. Tugwell, as to how he reached his decision. His answer was that the Secretary had read the summary presented by appellant's Brief, conferred with his subordinates who had sifted and analyzed the evidence but had not conducted a full hearing before him. Apparently the purported hearing was before a predecessor cabinet member. The court stated that the right to a hearing embraced not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The Secretary should have informed what the Government proposed and the opposition be heard before the final command as to rates or regulations should be issued. The instant case was before one and the same judge who heard a long and complicated trial consisting of many Exhibits, a multitude of pleadings, Motions, cross-examinations, oral and written arguments, being not able to make up his mind and then finally after



Mason's letter to the Michigan Supreme Court, he then decided for the defendant. In fact, in his Opinion which is found in Petitioners' Appendix B, Pages 8a-11a, he stated:

> "It should be noted that this Court has reviewed the transcripts of the greater part of the testimony offered in this cause prior to the entry of this Opinion. It being conservative to estimate that the transcripts comprise the essential testimony of the various parties and consist of in excess of 500 pages. *A further trial of the cause could result in no more thorough or comprehensive offering of testimony than that before the Court at this time.*" (Emphasis supplied)

Hence, we have the same trial judge, a complete record of the testimony and Exhibits, and the judge's final Opinion upon which the judgment was based. In the *Morgan* case, the Secretary of Agriculture actually did not hear the case. He relied upon only the written record, the Briefs, and the analysis of the evidence given him by his subordinates. This Circuit Judge Frank Jeannette did not do. He did it all himself and reached his own Opinion and Entry of Final Judgment.

Petitioners' Page 15 cites *Wayne County Prosecutor* v *Doerfler,* 14 Mich App 428, 165 NW2d 648 (1968), wherein an obscenity case resulted in, *before trial,* an Affidavit being filed for a change of venue for the trial judge in order to disqualify him stating that he had motivated the community against the sale of obscene literature. This is based upon the Michigan General Court Rules of 1963, No. 405 which is accurately stated on Page 15 of petitioners' application for certiorari. However, again this is irrelevant because this is a motion for a change of venue from the judge before the judge started the trial. Here we have an

attack upon a conscientious trial judge after the trial had been totally completed.

*Groopi* v *Leslie*, 404 US 496, 92 S Ct 582 (1972), was Habeas Corpus because petitioner was adjudged in contempt of the Wisconsin State Legislature, was served with documents pertaining thereto while sitting in the county jail for a disorderly conduct charge, and was never given an opportunity to present his side of the case with a "minimal right" of defending himself of the charges. This cases differs entirely from the present one before the Court. Here plaintiffs were given an opportunity to cross-examine and did cross-examine the polygraph operator. In addition after the trial they requested the right to cross-examine the Court Administartor and defense counsel, *but have never done so to this date*. Each one of these requests were made when all of these people were availabl, ready, willing and able, and after the total trial had been completed. Thus the case is not applicable.

*Ross* v *Moffitt*, 417 US 600, 94 S Ct 2437 at 2443 (1974), emphasizes fairness between the State and the individual as quoted therein. This 1974 case before the U.S. Supreme Court involved simply the issue of interpreting *Douglas* v *California* requiring appointment of counsel of indigent State defendants on their first appeal as a right and should it be extended to require counsel for discretionary State appeals and for applications for review in this Court. The fairness between the State and the individual extends not only between the State of Michigan and plaintiffs Meshriy but also extends to fairness between the State of Michigan and the Sun Oil Company and in particular to fairness between the State of Michigan and Walter C. Mason, a person accused of no crime but publicly pilloried as a liar



and a forger. The actual result therefore is that his letter, merely asking for a judgment addressed to the State of Michigan cannot be anything else but a plea that the trial judge render an opinion and a final judgment which would brand witness Mason, not a party, either as a liar and forger or as an innocent man. Even the witness is entitled to his rights. Because he wrote a letter requesting that in all fairness his good name be cleared, it cannot be said that he infringed upon due process.

The statements made by petitioners on Page 14, characterizing "secretly reached the trial judge while the petitioners, unaware and ambushed"; on Page 16, the statement "a trial by ambush undercutting" is a sorry reflection upon the fact that a witness subpoenaed has to undergo such unjust accusations. To require a solution, even though a letter resulted in a solution, cannot be deemed denying plaintiffs of due process.

*Davis* v *Wechsler*, 263 US 22, 44 S Ct 13 (1923) is cited at Page 16 for the proposition that a Federal right, when plainly and reasonably made, is not to be defeated under the name of local practice. This case is irrelevant because at the very start of the trial, being for personal injuries suffered by plaintiff passenger of the Great Western Railroad when it was under Federal control, resulted in a judgment for defendant because of the fact of a venue order and a procedure adopted by the State setting forth that by Missouri practice the defendant had a right to unite a plea to the jurisdiction and a defense on the merits resulting in the trial never getting off the ground. Mr. Justice Holmes said at Page 14 of 44 S Ct that:

> "Whatever springs the State may set for those who are endeavoring to assert that the State confers, the assertion of Federal rights, when plainly and

reasonably made, is not to be defeated under the name of local practice."

The great difference between the instant case and *Davis* v *Wechsler* is that in the latter case, an asserted defense was deprived before the trial even started. In the instant petition, the Federal question was not only waived, if one existed, but in addition was raised only after the evidence had been completely in, the trial closed and the obvious result had to be for the defendant.

Most of the cases cited by petitioners are prefixed by generalizations. Thus on Page 16 of the Petition, *Angel* v *Bullington*, 330 US 183, 67 S Ct 657 (1946) is cited merely for the proposition that a State cannot interpret a State statute so as to deprive a U.S. District Court from hearing a Federal action. That case involved the North Carolina statute which prohibited deficiencies on account of the purchase price of real property. In the pleadings the claims are based on the U.S. Constitution and the Court held that using the word "jurisdiction" in the statute would be insufficient to bar a Federal question and prevent Bullington from the using the Federal Court if he so desired. With that case respondent heartily agrees but cannot see its relevancy to the instant action.

*Cox* v *Louisiana*, 379 US 559, 562, 85 S Ct 453 (1965) is cited for the generalization of "the unhindered and untrameled functioning of our courts is part of the very foundation of our constitutional democracy." (At Page 16 of petitioners' Request). *Cox* reversed a conviction of a group of students who assembled peaceably at the State Capitol Building and marched to the courthouse where they sang, prayed and listened to a speech by defendant who was convicted of disturbing the peace and of obstructing public passages in violation of State statutes. Defendant was given



3 cumulative sentences in jail of 4 months plus 5 months plus 1 year as well as total fines of $5,700. The Louisiana Supreme Court affirmed the convictions on the grounds that the disorderly conduct and obstructing use of the public sidewalk by approximately 2,000 students who were orderly, peaceful, sang, prayed and gave a speech, was a constitutional infringement upon the rights of religion and free speech. It is impossible to see the relevancy of this case to the instant situation.

Petitioners Page 16 cite *Titus* v *Wallack*, 306 US 282, 59 S Ct 557 (1939). Respondents agree with the generalization that the asserted federal right when denied by a state court, the sufficiency of the grounds of State denial is for the U.S. Supreme Court to decide. *Titus* was simply a case whether or not a New York State Court judgment was entitled to full faith and credit in Ohio. It was for the U.S. Supreme Court to decide whether or not an assignment existed or there was fraud in procuring the judgment or whether or not the record owner of the judgment was or was not entitled to full faith and credit under the constitutional provision. It decided that only the U.S. Supreme Court (and other federal courts) had the right to decide and it decided for the latter, namely, the record owner of the judgment was entitled to full faith and credit. With that respondents have no quarrel. It simply leads to the question whether or not the letter of Walter C. Mason to the Chief Justice of the Michigan Supreme Court complaining about not being cleared because of the accusations of forgery and being a liar that had made against him would so affect the trial judge so as to require him to hold for the plaintiffs or for the defendants. His opinion indicates that he held for the defendants after he had once indicated that he didn't know which way to hold when the

burden of proof was on the plaintiff-petitioners. This then raises the question: Is there a "substantial" Federal question involved in this petition for certiorari?

Pages 13-14 cites *State* v *Johnson,* 77 Oh St 461, 83 NE 702 (1908) where Johnson under the name Ryan wrote a letter prior to trial to the Common Pleas Court involving a civil suit between himself and one Slater. A comparison of the letter written by Mason (Appendix H, Pages 14A-16A) with the Johnson-Ryan letter shows no attempt to obstruct justice but for witness Mason and his wife, Anna to be found forgerers and perjurers or not.

*The Kinnear-Weed Corp* v *Humble Oil,* 403 F 2d 437 (1968), raised the issue before trial whether a Federal District Judge or his relatives had a monetary interest in litigation before him. Certainly Judge Jeannette has no financial interest aligned with Meshriy, Sun Oil or the Mason family. His interest was only in the superintending control of the Supreme Court of Michigan over the Circuit Trial bench pursuant to the Michigan Constitution.

## II.

## THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT AND DOES NOT RAISE A FEDERAL QUESTION.

Plaintiffs-appellants have limited the scope of their appeal expressly to the presentation of a federal question. However, a federal question as alleged requires more. What it requires is a *substantial* federal question. Precisely what is a substantial federal question, or as it is sometimes stated, and "insubstantial question" or a "frivolous appeal"?

The standards or guides which a court may use to determine whether there is a substantial federal question presented so that certiorari should be granted is very similar to whether or not there is a question of great moment influencing state-wide jurisprudence, thereby making analogous the Application for Leave to Appeal with the definition of a substantial federal question.



A "substantial" question would be one against a federal right which had never been foreclosed but it would be insubstantial and frivolous if it had been previously decided. Hence, Wright, Charles Allen, "Law of Federal Courts" at Pages 483 and 484 sets the following standards as being required:

1. Raising the question in the lower courts. This was done but not timely in this particular case. This was only after the trial was concluded and apparently more than fourteen months thereafter and then only when the decision was adverse to plaintiff;
2. It must be a final judgment. This is an Application for Certiorari from a final judgment without a doubt instead of being a piece-meal review;
3. An insubstantial federal question or, by analogy, the meritorious Application for a Petition For Ceriorari must be of general state-wide jurisprudence and also of federal-wide jurisprudence. This would be a situation wherein (a) there is a conflict of decisions between the intermediate appellate courts which should be resolved for the guidance of the entire judiciary; (b) the important question had never been decided before. If decided before then, even though a federal question, it would not be considered substantial.

That is precisely the case here.

Defendant's counsel very carefully pointed out to the trial judge as to the use of the polygraph examinations, that this matter had been previously decided by the late

Honorable Macomb Circuit Judge James Spier in the case of *Stone* v *Earp*, 331 Mich 606 (1951), a civil action in chancery for determination of title to a dump truck and trailer. Judge Spier suggested that he wanted lie detector tests before deciding the issues. A Stipulation was entered that each party would voluntarily submit to the polygraph test. Mr. Gregory administered the test and formed his opinion. The trial court held for the defendant which was consistent with Mr. Gergory's opinion, and Judge Spier further said:

> "The polygraph tests were a definite aid to the court in this case, in supporting what appeared to be the preponderance of the evidence, and in removing doubt in the court's mind as to the possibility of fraud owing to the fact that all of defendant's three witnesses to the payment were his own immediate family."

Plaintiff's Appeal urged that it was error to give consideration and weight to the opinion of the polygraph operator. Mr. Justice Sharpe said at Pages 610 and 611 of 331 Mich that:

> "We are not unmindful of the fact that at the direction of the trial court, the parties agreed to submit to the tests, but whether by voluntary agreement, court direction or coercion, the results of such tests do not attain the stature of competent evidence, in that the preponderance of evidence was in defendant's favor prior to the admission of such tests. This is only another way of stating that plaintiff had not maintained the burden of proof. In all civil cases, whether in law or chancery, the burden of proof is upon the claimant. Under the circumstances of this case the admission of the result of the tests in evidence, while error, was not prejudicial for reasons heretofore stated."



This is precisely the case in the instant case. It simply amounted to the judge when he first said he couldn't make up his mind, he then made a decision after the letter from Mr. Mason. However, it must be remembered that at the same time, the opinion of the Michigan Court of Appeals said that two of the three issues raised by plaintiff-appellants were abandoned because not briefed. This raised only the question remaining in the case, namely, whether a letter of Mr. Mason's (a witness and not a party to the case), influenced the judge after the evidence was in and he said he could not make up his mind. This certainly is not a question of great jurisprudence to the entire state of Michigan or of the United States, but is frivolous and insubstantial.

There is very little actually written as to the substantial federal question issue. A long and most difficult article, of which the above short statement is a summary, written by Ulman and Spears "Dismissed for Want of A Substantial Federal Question". 20 Boston University Law Review 501-531 plus a note entitled "The Insubstantial Federal Question" appears in 62 Harvard Law Review 488-496.

Hence, judged by the sole and remaining issue in the case, the first two issues not having been preserved by the plaintiffs-appellants in their Brief in the Michigan Court of Appeals, therefore, the only issue from which they can appeal is wholly that a letter from Walter Mason to the Chief Justice of the Michigan Supreme Court complaining of the long delay in rendering a decision in order to clear his name and his wife's name from being designated forgers and liars could arise to the dignity of a federal question which had any merit. If anything, it was simply a finding as to whether or not the plaintiffs had sustained the burden of proof which clearly had not

been done. The State Courts' decisions are sustainable solely on matters of local law, in dependently of the federal constitutional question.

## CONCLUSION

Respondent requests that this Court deny petitioners' request for certiorari. In particular because of the long delay occasioned by the demand for cross-examination and the necessity of defendant's counsel's preparation of various Orders even though adverse to his side; that attorney's fees and total court costs including increasing the $175 award of costs by the trial court should be ordered amended for purposes of being taxed.

Respectfully submitted,
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